Office - Supreme Court,
FILED
MAY 29 1950
CHARLES ELMORE CROP
OLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted] 95

HOLLY STORES, INC.,

Petitioner,

vs.

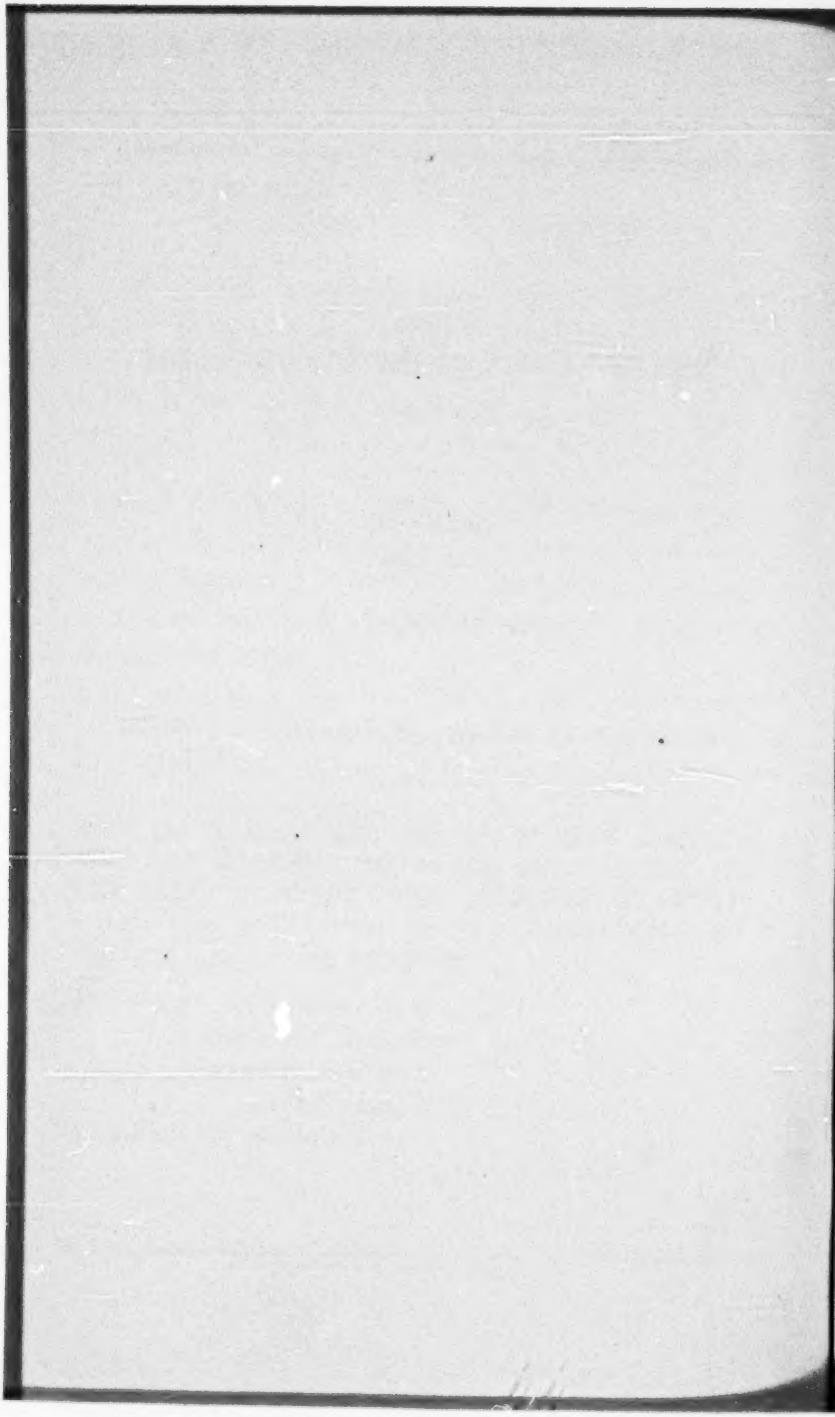
JAMES A. JUDIE AND MARGARET I. JUDIE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

S. J. CRUMPACKER, SR.,
WALTER FELDESMAN,
GEORGE N. BEAMER,
NATHAN LEVY,
Counsel for Petitioner.

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO



SUBJECT INDEX.

	PAGE
Petition for writ of certiorari	1
Summary statement of matter involved	1
Jurisdictional statement	2
Questions presented	3
Reasons relied on for allowance of writ	4
Prayer for writ	4
Brief in support of petition for writ of certiorari	7
Opinions of courts below	7
Jurisdiction	7
Statement of the case	11
Specification of errors	8
Argument	24
Summary of Argument	9
Point 1	24
Point 2	27
Point 3	28

TABLE OF CASES CITED.

Brier v. Rosebrock (1921), 76 Ind. App. 290, 295, 53 C. J. 975, Sec. 113 31

Chatz v. Armour Plant Employees' Credit Union (1946), 7 Cir., 154 Fed. (2d) 236, 240 26

Habbe v. Viele, 148 Ind. 116, 125 (R. .....) 31

Hammond Hotel and Improvement Co. v. Perrin (1932), 96 Ind. App. 311, 318, 184 N. E. 946 31

Jumper v. Queen Mab Lumber Co., 106 S. E. 473 (S. Ct. S. C. 1921) 28

Lawrence v. Muter Co., et al., 171 F. 2d 380, 384 30

McNair v. Public Savings Insurance Company of North America, et al. (1928), 88 Ind. App. 386, 397..... 31

Maryland Casualty Company v. Cushing (1948), 7 Cir., 171 Fed. (2d) 257, 259..... 26

Massachusetts Bonding & Investment Co. v. Lundy (1947), 8 Cir., 160 Fed. (2d) 680, 683.....24, 31

Renihan v. Piowaty (1932), 94 Ind. App. 523, 529, 179 N. E. 568..... 31

Robinson et al. v. Glass, 94 Ind. 211, 212..... 31

Sanders v. Monroe, Cir. (1926), 10 Fed. 2nd 997, 999.. 31

Schwartz v. Keenor, et al. (1882), 87 Ind. 258..... 31

Sinclair v. Pugh (1902), 29 Ind. App. 614, 619..... 31

Skelton v. Federal Surety Company (1926), 15 Fed. 2nd 756, 799, 8 Cir..... 31

The Board of Commissioners of Hamilton County v. Owens (1894), 138 Ind. 183, 187..... 31

Toops v. Snyder, et al., 70 Ind. 554, 560..... 30

United States v. United States Gypsum Co. (1948), 333 U. S. 364, 395; 68 Sup. Ct. Rep. 525, 542..... 25

Upton, Assignee v. Tribilcock, 91 U. S. 45, 50 (R. 232-3) 30

Vargas v. Esquire, Inc., 166 F. 2d 651, 654..... 30

TEXTBOOKS AND ENCYCLOPEDIAS CITED.

Pomeroy Equity Jurisprudence (3rd Ed.) 856..... 32

Restatement of the Law of Contracts 504, 508..... 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

HOLLY STORES, INC.,
Petitioner,

vs.

JAMES A. JUDIE AND MARGARET I. JUDIE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action for reformation of a lease. The action was originally brought in the District Court of the United States for the Northern District of Indiana, South Bend Division, by petitioner herein. A decree was rendered in favor of petitioner from which an appeal was taken by respondents to the Court of Appeals for the Seventh Circuit,

which reversed the decree of the District Court and remanded the cause with directions that the decree of the District Court be vacated and the complaint dismissed for want of equity. Respondents, in a counterclaim, sought attorneys' fees and expenses, and the Court of Appeals left this question open for further consideration by the District Court.

The principal questions involved on said appeal relate to the principles of equity governing cases of reformation of instruments on grounds of mutual mistake and the weight to be accorded the findings of a trial court in an action tried without a jury.

THIS COURT HAS JURISDICTION.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because of the terms of Section 1254 (1) of the Federal Judicial Code, 28 U. S. C. 1254 (1).

The decree of the Circuit Court of Appeals was entered January 30, 1950.

QUESTIONS PRESENTED.

The questions herein presented are:

1. Whether the decree of the Court of Appeals is contrary to the principles of equity governing reformation of written instruments for mutual mistake, both in the courts of the State of Indiana and in the courts of appeal of other Circuits in Federal Judicial System.

2. Whether the decree of the Court of Appeals is contrary to the rules governing the weight to be accorded the findings of fact of trial courts in causes tried without a jury.

3. Whether the basis of gauging the evidence in the instant case was in conflict with the usual and accepted procedures in cases of reformation of written instruments on the grounds of mutual mistake.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on for the allowance of the writ are as follows:

1. The Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

2. The Circuit Court of Appeals has decided an important question of local law in a way apparently in conflict with applicable decisions of the Supreme Court of Indiana.

3. The Circuit Court of Appeals has departed from the accepted and usual rule concerning the weight to be accorded the findings of fact of a trial court in an action tried without a jury.

4. The Circuit Court of Appeals has wholly ignored one of the usual rules governing evidence, and has based its decision in part upon a wholly erroneous statement of the principles governing actions for reformation.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9914, Holly Stores, Inc., plaintiff-appellee *vs.* James A. Judie and Margaret I. Judie, defendants-appellants, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the

judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this court may seem proper.

Dated this ..... day of May, 1950.

S. J. CRUMPACKER, SR.,
WALTER FELDESMAN,
GEORGE N. BEAMER,
NATHAN LEVY,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

HOLLY STORES, INC.,

Petitioner,

vs.

JAMES A. JUDIE AND MARGARET I. JUDIE,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The District Court did not issue a formal opinion, but its findings of fact and conclusions of law are to be found in the record (R. 200 ff.). The opinion of the Circuit Court of Appeals for the Seventh Circuit is found at R. 225 ff.

JURISDICTION.

This court has jurisdiction to review the decree in question under Section 1254 (1) of the Federal Judicial Code, 28 U. S. C. 1254 (1).

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1a. In reversing the finding of the District Court to the effect that there was, as a matter of fact, a mutual mistake.

b. In finding that respondents were not involved in the sequence of events which led to the mutual mistake.

c. In wholly disregarding the findings of fact of District Court with respect to the weight of evidence.

d. In wholly disregarding the usual rule governing the weight to be accorded the findings of fact of a trial court.

e. In holding that the District Court's findings relating to negotiations of the parties were not controlling.

2. In holding that controversy at the time of trial over the meaning of a document representing a part of the negotiations of the parties was a basis of determining that there was no meeting of the minds prior to the execution of the instrument sought to be reformed.

3a. In holding that petitioner could not obtain reformation because of its negligence.

b. In holding that a court of equity ought not take cognizance of petitioner's cause of action.

SUMMARY OF ARGUMENT.

1. The Court of Appeals declared that the evidence relied upon by the District Court was not of the "certain and substantial nature" required in cases of this kind. The record indicates that the negotiations were carried on by two witnesses primarily. The record indicates that one of these was the respondent, James A. Judie, who, despite lapses of memory, did both in specific testimony and by direct answers to questions relating to his intention corroborate almost item by item the testimony of the petitioner's agent. There was no dispute between the parties concerning the degree of proof needed, and the trial court understood that requirement. The evidence clearly establishes that there was a mutual intention, and that the principal negotiators for both parties failed only in the expression of that intention.

2. The Court of Appeals indicates (R. 237) that the existence of a controversy at the time of trial as to the meaning of language in a certain letter which was a part of the negotiations was "a strong indication" that there had been no preliminary meeting of the minds. Petitioner admits that there was this controversy at the time of trial, but denies that it is a legitimate basis upon which to rule, even in part, that no meeting of the minds occurred during the actual negotiations themselves.

3. The decree of the Circuit Court is not wholly clear as to the grounds of actual reversal, and either of two fundamental bases may be relied upon: (a) either a lack of clear and convincing evidence (which is discussed in the summary points above); or (b) a loss of equitable rights because of petitioner's negligence. As to this lat-

ter point petitioner respectfully urges that the finding of the court below, that mutual negligence occurred in expressing the mutually agreed intention of the parties should be final and binding, since there is ample evidence to support it. Petitioner also urges that in a case for reformation of an instrument on grounds of mutual mistake the effective moment with respect to the rights of the parties occurs at the time the mutual mistake itself takes place, and cannot be affected by later activity. No mutual mistake can occur without at least inadvertence, and probably none without negligence to apply this rule, which is effective in other equitable proceedings; as for example, a proceeding to rescind an instrument, in this case is to put a limitation upon reformation not consciously recognized by the courts of Indiana or any other jurisdiction.

STATEMENT OF THE CASE.

Petitioner through its agent, Weiser, and respondents, by Mr. Judie, through a long series of conversations, established a common intention as to the leasing of certain premises. Judie desired $45,000.00 in gross income from the premises against 7% of sales. Judie desired to be free of the trouble of caring for the property. In addition, Judie, after reflection, desired that petitioner pay any increase of taxes and insurance which might result from alterations to the premises made by petitioner. It was, therefore, agreed that petitioner assume payment of these taxes and insurance. In exchange therefor, petitioner was to be given a credit in the amount of $7,000.00, against the agreed sum of $45,000.00, the $7,000.00 representing insurance and taxes.

It was not then or ever the intention of petitioner or Judie that the payment of the taxes and insurance by petitioner should result in the increase of income received by respondents from the building. It was not then or ever the intention of petitioner or Judie that the 7% should be increased. Yet the lease unreformed, yields both of these unintended results.

Petitioner's case was based on the contention that as a result of a mutual mistake, the mutually agreed intention of the parties was imperfectly expressed in the lease. The mistake arose from a lack of understanding on both Judie's and Weiser's part of the mechanics by which the mutually agreed intention could be properly expressed. There is, however, a formula which perfectly expresses this mutual intention, and it is submitted that this formula was properly applied by the District Court.

The Burden of the Petitioner.

Petitioner recognizes that the proof required to be submitted by it meet the test normally applied to equity proceedings for reformation, and that this evidence be "clear and convincing".

The Intentions of the Parties.

This section of the brief will be presented with separate analyses of the testimony of each principal witness and a comparison thereof. Judie is an elderly man whose recollection of even the substance of conversation between himself and Weiser was either lacking entirely or was incomplete and partial. Because of this situation it was necessary that Judie be asked directly what his specific intention was or was not with respect to various phases of the negotiations. His answer on these matters, when combined with some of the recollections that he had, and combined further with some of the written evidence preceding the drafts of lease, establish his intention quite clearly. It is submitted that either Judie's recollection matches and corroborates the testimony of Weiser, or upon failure of his recollection, then with the written evidence preceding the drafts of lease, or Judie's flat statement of his personal intention precisely corroborate the testimony of Weiser.

A. The Intention of Mr. Judie.

"For a period of six months anyhow" Mr. Weiser and Mr. Judie discussed the leasing of the entire building to petitioner (R. 143). Shortly prior to the letter of May 13, 1946, Mr. Judie and Mr. Weiser had conversation relating to the terms of such a lease (R. 143). Mr. Judie told Mr. Weiser that the lease would be a percentage lease with a basic rental of $38,000.00 which was $4,000.00 less than the

income of the property in 1945 (R. 144). Mr. Judie admits that he told Mr. Weiser orally as well as in the letter of May 13, 1946, that the taxes were approximately $6,000.00 (R. 144). Mr. Judie concedes that it was agreed that plaintiff would assume taxes and insurance (R. 144). Mr. Judie admits that he discussed insurance with Mr. Weiser though he says he did not tell and Mr. Weiser did not ask the amount of the premium (R. 144-5).

Immediately after the leases were drafted and the final lease executed, Mr. Kossove called Mr. Judie and stated that there was a mistake (R. 150). Mr. Judie recollects the conversation (R. 150). Mr. Judie states that despite repeated requests he absolutely refused to change the terms of the lease (R. 150).

On cross-examination Mr. Judie testified that he told Mr. Weiser he would be getting $24,000.00 for one part of the property, and that he was getting $21,000.00 on the corner portion (R. 153-5). Mr. Judie testified that he wanted a percentage lease as a hedge against inflation (R. 155). Primarily "to get rid of the care of the property," Mr. Judie wanted petitioner to assume all carrying charges so that he would be free of the entire responsibility in connection with the property (R. 155-6). Mr. Judie intended to get 7% on gross sales straight through (R. 156). Mr. Judie's testimony with respect to any conversations with Mr. Weiser on tax and insurance is confusing since Mr. Judie alternately states that he did, and that he did not discuss these matters with Mr. Weiser (R. 144-5; 157-8). In explaining the letter of May 13, 1946, Mr. Judie says, contrary to the very language of the letter, that the purpose of deducting $4,000.00 from $24,000.00 and $2,000.00 from $20,000.00 was not for the purpose of giving credit for the taxes (R. 159). He then testifies after examining the letter that he did arrive at the $38,000.00 figure by giving credit on the total for taxes of $6,000.00 (R. 160). Mr. Judie

states that if he had used $21,000.00 and reduced the amount of taxes $2,000.00, the resulting figure would have been $19,000.00, instead of $18,000.00 (R. 161). He would not state that $21,000.00 was the correct figure of income on the corner part of his property; but on the basis of Petitioner's Exhibit 3 he stated, "according to the papers, it looks that way" (R. 161). Mr. Judie states that there is only one way to determine the figure at which the percentage starts and says that he would use the same method no matter whether the landlord or the tenant paid the taxes and insurance (R. 165-7). Yet Mr. Judie states that it was not his intent in having the petitioner pay taxes and insurance to arrange a lease with petitioner for the entire building in order to get a greater income or to increase the percentage rental (R. 155-6).

B. The Intention of Petitioner as Shown by Mr. Weiser.

Mr. Weiser testified that after a number of conferences with Mr. Judie in which he sought to lease the corner portion of the property on his own behalf (R. 52-54), he began to negotiate with Mr. Judie for the leasing of the entire property for petitioner (R. 54). Mr. Judie told Mr. Weiser that he wanted an additional $21,000.00 for the corner portion of the premises and handed Mr. Weiser Petitioner's Exhibit 3 (R. 191) to demonstrate that that was approximately the amount he was then receiving from that part of the building (R. 56). Mr. Weiser testified that Mr. Judie said that if they took the corner property the lease would have to be $45,000.00 against 7% (R. 57). Mr. Weiser reported to Mr. Judie that Mr. Kossove had approved the idea (R. 57). Mr. Weiser then testified that Mr. Judie called him and said that he had thought of something "that did not really make it a $45,000.00 lease" (R. 57-8). Mr. Weiser states that Mr. Judie said if the building is remodelled and improved, the taxes would be increased and

he would not be getting to net amount out of the property which he wanted (R. 58). Mr. Weiser testified that the next day he saw Mr. Judie in the office and suggested that they deduct from the $45,000.00 what the present taxes and present insurance costs are so that Mr. Judie would not be obligated in any way to pay increased taxes or insurance resulting from improving or remodelling the building (R. 58). Mr. Judie found this agreeable (R. 59). Mr. Weiser states that Mr. Judie had told him that the taxes were about $6,000.00 and the insurance premiums about $1,000.00 (R. 61-2; 85-6).

C. A Comparison and Contrast of the Testimony of Mr. Judie and Mr. Weiser.

Mr. Judie said that Mr. Weiser negotiated with him on behalf of the petitioner "for six months anyhow." Mr. Weiser fixes the time as about the first of the year, 1946. Considering that the first draft of lease was prepared about the 20th of May, 1946, we feel that it may be said that the parties agree on this point.

Mr. Judie admits and he told Mr. Weiser he would be getting $24,000.00 for one portion of the property and that he was getting $21,000.00 out of the corner portion (Mr. Judie's testimony on this amount is wobbly because of poor recollection, but he does admit to the figure of $45,000.00, both as a part of conversation with Mr. Weiser and by the presence of Plaintiff's Exhibit 3, which Mr. Judie admits giving to Mr. Weiser as representing the income from the remainder of the building). Mr. Weiser says that Mr. Judie told him he wanted $45,000.00 out of the premises. Considering all of Mr. Judie's testimony on this point in the light of the Plaintiff's Exhibit 3, we feel that it may be said that Mr. Weiser is fully corroborated on this point.

Both testified that the parties agreed on a percentage of 7%.

Mr. Weiser testified that Mr. Judie told him in conversation that he did not want the burden of taking care of the building, and Mr. Judie does not testify to this as a matter of conversation, but does testify that he wanted a single tenant for the entire property primarily to relieve himself of this burden and the bother of paying taxes and insurance. We submit that on this point there is complete agreement between the two witnesses.

Mr. Weiser testified that as a part of a conversation with Mr. Judie, Mr. Judie was worried about inflation and wanted a percentage lease as a hedge against inflation. Mr. Judie does not testify to this as being a part of a conversation that he recollects with Mr. Weiser, but he does say that he wanted a percentage lease for that reason along with the desire to get rid of the burden of handling the property. Again we submit that the testimony of the two witnesses is identical on this point.

Mr. Weiser testified that Mr. Judie spoke to him of taking over the payment of taxes and insurance to escape the possibility that he might have to pay increased taxes and insurance if the building was remodelled and improved. Mr. Weiser testified that Mr. Judie told him that because of this possibility he would not net from the property the amount that he wanted to get. Mr. Judie has no recollection of these conversations and, indeed, denies them, but he does positively testify that in passing the responsibility of paying taxes and insurance to plaintiff, it was not his intention to get any increased income out of the property, but merely to relieve himself of the responsibility. This testimony by Mr. Judie of his intention at the time is wholly inconsistent with any set of circumstances except those to which Mr. Weiser testified.

There is a hopeless contradiction between these two witnesses with respect to the inclusion in their conversation of anything concerning the amount of insurance premiums.

Mr. Weiser says that Mr. Judie told him the insurance premiums would be about $1,000.00 per year. Mr. Judie states that he did discuss the matter of insurance with Mr. Weiser, but never said and was never asked anything about the amount of premium cost. On this matter we submit that Mr. Judie's testimony is entirely confusing and wholly unsatisfactory. There are two matters within the record over and above Mr. Weiser's testimony on the subject, which may be of some help to the court. Mr. Judie admits that the insurance matter was discussed. Whatever the amount of the insurance, it is clear that Mr. Judie wanted that it be taken care of by plaintiff. It is also clear, as we contend, that he wanted this payment to be made not as a basis of increasing his income from the property, but as a ministerial act, a device designed to remove bother and trouble from him. In the light of the evidence which establishes the income which he expected from the entire building at $45,000.00, the disappearance of the $1,000.00 item in the letter of May 13, 1946, is inexplicable except upon the assumption that Mr. Judie forgot either the $45,000.00 income or a statement that insurance premiums were $1,000.00 at the time that he prepared the letter of May 13th.

It is our contention that Mr. Weiser's testimony throughout follows either the recollection of Mr. Judie or arises as the only possible inference from statements which Mr. Judie made as to his intent and desire at the time. In effect, Mr. Judie corroborates Mr. Weiser on every matter to which Mr. Weiser testified, except the item of insurance. We submit that in light of this direct and indirect corroboration through Mr. Judie's own mouth, that the evidence establishing a mutual intent on the part of Mr. Weiser for the plaintiff and on the part of Mr. Judie for himself and his wife, is inescapable.

As to the $1,000.00 item, Mr. Weiser is either telling the truth or he is lying. In the face of the corroboration of every other matter relating to intent it seems to us clear that Mr. Weiser's testimony is entitled to belief. The court may have absolute confidence in his statement on that item since his testimony in every other regard relating to intent is fully corroborated.

D. A Statement of the Intention of the Parties.

The parties have negotiated for six months. They have agreed that Mr. Judie's income from the building will be $45,000.00 per year. The parties agree on a percentage lease of seven (7%) percent of the gross sales. Mr. Judie states that he wanted that much income and no more, but that he also wanted to get out from under the trouble of caring for the property and wanted to have a hedge against inflation. The petitioner intended to remodel and improve the building. Mr. Judie did not wish to be burdened by paying additional taxes or insurance which might result from the improvement since that would actually reduce the amount of income that he aimed to get from the property. The parties agree that petitioner would pay taxes and insurance, and that credit would be given to the extent of $7,000.00 therefor, and in that manner petitioner would absorb any increase in the amount of such taxes and insurance.

This set of desires, this group of individual intentions of Mr. Judie, when put together spell out the intent of the parties. They can be given full effect and can be expressed in a simple formula.

The formula would be to take the rent as agreed upon, $38,000.00 and add to it the credit for taxes and insurance, $7,000.00, (a total of $45,000.00—the gross income Mr. Judie desired) and divide by seven. Indeed, it is Mr.

Judie's own formula. This would give the point at which the percentage should begin to apply to gross sales. The application of this formula would give Mr. Judie the same income from the building that he intended to get, and relieve him from the obligation of taking care of the building and paying taxes and insurance, would provide him a hedge against inflation by insuring him of seven (7%) per cent of all sales above the figure determined and would satisfy completely the mutual intention of plaintiff and Mr. Judie. To permit the continuation of the formula now in the lease for the determination of percentage rental would be to frustrate the true mutual intention of the parties. The present formula by applying the seven (7%) per cent to sales in excess of the $542,000.00 does provide increased income to Mr. Judie contrary to the very intent that he expresses and that the plaintiff understood and shared with him.

MUTUAL MISTAKE.

The court will notice in reading of cases that relate to mutual mistake that Judges and lawyers, both, have had great difficulty in expressing just what the mutual mistake in each particular case consists of. The mistake in this instance we submit is based upon the inability of the two principal negotiators to express the mutually achieved intention in appropriate language. It is then a mutual mistake in expression. Mr. Weiser did not know how to express this mutual intention for as he testified, he had no understanding of the method of capitalizing a figure in order to determine the point at which percentage rental should begin. Likewise, Mr. Judie was not acquainted with the proper mechanics of expressing the mutual intention in a percentage lease with a provision requiring the tenant to pay taxes and insurance. He testified there was only one way to figure percentage rentals and you would use this one way regardless of who paid the taxes and insurance. These two bits of testimony might clearly indicate that although the parties had arrived at an agreement they were mistaken with respect to the mechanics of the proper expression thereof. Their mutual mistake arose from Mr. Weiser's reliance upon Mr. Judie's ability as a draftsman to properly express the mutual intention, and Mr. Judie's erroneous belief that this lease arrangement was no different than the others which show up in plaintiff's Exhibits 1 and 2 (R. 176 ff.). Mr. Judie did not understand that to the extent the percentage was applied on the amounts in excess of the $542,000 figure but less than the $642,000 figure, he was receiving more income than he had previously received. He was not actually

giving credit to the plaintiff for the insurance and taxes. Instead of being a 7% lease "straight through" it is in each instance when sales reach or exceed $642,000 a lease of 7% on the first $542,000, 14% on the next $100,000, and 7% on all sales in excess of $642,000. This might also be expressed in the way that it was by Mr. Kossove. With $38,000 as guaranteed rent plus $7,000 for taxes and insurance, plus $7,000 on the sales between the $542,000 and the $642,000 figure, the rental income would be $52,000 or slightly in excess of 8% on that volume of sales.

Mr. Judie testified at the conclusion of his direct examination that the lease contained the terms which he intended it to contain and that he never could find any mistake in the lease and that the lease has never been questioned (R. 152). Mr. Judie repeated much the same testimony on cross-examination (R. 152; 161-3). He also testified that he did not recall Mr. Weiser saying anything about a mistake being made (R. 162) and says, although taxes and insurance were discussed, it was his best opinion "that there was nothing said about a mistake in the lease" (R. 162). He then testified that he received a letter from Mr. Fredericks as the first indication that plaintiff claimed there was a mistake (R. 162).

On direct examination, however, when the question put to him did not refer direc[illegible]to the question of mistake but only to a telephone call from Mr. Kossove, Mr. Judie testified as follows (R. 150):

> "Q. 'Then what was the next thing you heard regarding the lease?'
>
> A. 'Well, after the lease was delivered, I think it was about the second day, Mr. ....., the plaintiff, called up and said there was a mistake, and it would make it too expensive after assuming all charges against the property, insurance, and so forth, and he would not stand for it.'

'Well,' I said, 'Mr. Kossove, you read the lease, didn't you?'

'No, I didn't.'

'Well, with the amount involved, are you in the habit of entering into leases and not reading them?' "

"And he said, 'I didn't have time. That was the reason I did not go over this lease. I depended upon my attorneys to go over and advise me whether everything was all right.'

Q. 'Did you refuse to change the terms of the lease?'

A. 'Absolutely.' "

Mr. Judie was reminded of the following question and answer from his deposition (R. 163):

"Q. 'After this lease was executed by both parties, how long after that did you first hear from the representative of the petitioner corporation?'

A. 'When they expressed their opinion as to a mistake or something of that sort. I think it was two or three days as near as I could come to it.'

'You said that, didn't you, in your deposition?' "

He made the following answer thereto:

"A. 'I don't remember that.'

Q. 'Well, that is the fact, isn't it?'

A. 'No. There was nothing discussed about a mistake.' "

He was also reminded that he had been asked upon his deposition whether Mr. Weiser had spoken to him about it, and on deposition he had answered that Mr. Weiser had (R. 163). It may also be pointed out that in the third answer of respondents they admit that a mistake had been claimed.

Respondent Judie flatly testifies that the lease represented his intention and that there was no mistake. This is the natural reaction to be expected from a witness who is also a party. Other testimony of the same witness, par-

ticularly that which relates to motivation, leads to the conclusion that respondent Judie's intention and Mr. Weiser's intention were identical and resulted from their common negotiations. As against Judie's flat testimony which raises the controversy, there must be considered the following items of testimony given by Judie: that he was motivated by a desire to have a single tenant for the entire building (R. 155); that he was not motivated by a desire to get any more out of the building than he was getting (R. 156); that he did intend to give credit for the taxes (R. 160); that the purpose of having petitioner pay taxes and insurance was to relieve himself of the responsibility (R. 156).

The District Court made findings of fact (R. 203-4; 206) among which findings, 18(2), 18(3), 18(4), 18(5), 18(6), 20, 21, 23 (Amended), and 24 (Amended), were challenged. In substance these findings established that there was a mutual intention as described in the foregoing statement that the failure to express this intention was the result of mutual mistake and mutual carelessness.

The Court of Appeals in the early portions of its decree first states that the findings of fact, if accepted, are not decisive of the question as to whether or not a court of equity should have taken cognizance, and concludes that the negligence of petitioner, even though there was a mutual mistake, precludes petitioner's reliance upon the aid of a court of equity.

The court then states, "(R. 233) While we think the decree could properly be reversed on this basis, we are hardly content to do so without further consideration of the evidence as it relates to the court's findings of fact and conclusions of law." The court then concludes that the evidence is not of that certain and substantial nature required in order for relief to be granted.

ARGUMENT.

1. The Crucial Findings of Fact by the Trial Court Were Erroneously Set Aside.

The rules and the cases uniformly provide in substance that findings of fact of the trial court shall prevail unless they are clearly erroneous and that full consideration shall be given to the fact that the trial judge sees and has an opportunity to study the witnesses. The findings of fact in the case at bar are supported by the evidence which includes the testimony of Weiser, petitioner's agent, and the testimony of respondent, James A. Judie. It may have been anticipated that Weiser would testify substantially as he did. It also may have been anticipated that Judie would have denied many portions of this testimony. However, Judie goes forward in testimony in such a fashion as to erase and eliminate his own denials and to provide strong and positive evidence in corroboration of Weiser's position. Part of the corroboration by Judie of Weiser's testimony took the form of writings, but primarily they arise out of Judie's own statement as to what his intentions were. These corroborative statements, added to the testimony of Weiser, fully justify and substantiate the findings of fact, particularly those contained in the finding numbered 18 (R. 203-4). Attention is called to *Massachusetts Bonding and Insurance Company* v. *Lundy,* 160 Fed. Rep. (2d) 680 (C. C. A. 8th Cir. 1947). In that case the Circuit Court of Appeals reversed the District Court for failure to consider certain matters similar in nature to those which the District Court in this case took into account. Indeed that case, in which the complainant seeking reformation was the party which prepared the contract, is for that reason a more difficult case in which to justify reformation. In the

instant case, it was the respondent who drafted the instrument. Nevertheless, the court there was able to reverse rightfully, since there were present sufficient quantities of evidence upon which the proper formula for the expression of the intention of the parties could be based. That is precisely the situation in this case. The evidence of the intention and the evidence of the correct formula is present, and the District Court having heard the witnesses, having heard the denials which raised the controversy at the time of trial, and having heard the testimony of the respondent Judie as to his intentions with respect to the real estate and its leasing, combined these elements and expressed for the parties that which they had intended but which, due to mutual negligence, they had not properly stated.

This court has stated the rule governing such cases on numerous occasions, and no purpose would be served by listing these cases. Among the more recent cases effectively holding that findings of fact shall not be set aside unless clearly erroneous, and that fair weight shall be given to the opportunity of a trial judge to estimate the credibility of witnesses is *United States* v. *United States Gypsum Co.* (1948), 333 U. S. 364, 395, 68 Sup. Ct. Rep. 525, 542, and cases therein cited.

The Court of Appeals without having been able to study the demeanor of either Weiser or Judie, particularly of Judie at the time the critical questions with respect to intent were put and answered, nevertheless construed the testimony in a manner most favorable to the contention of respondents rather than in support of the findings of the District Court.

The Court of Appeals says (R. 238) "that his (meaning Judie's) statements are capable of either interpretation". The District Court may have felt that the statements were capable of more than one interpretation, but with the witnesses before it, it determined the interpretation that was

meant, and that determination resulted in the findings of fact which are upset. The failure of the Court of Appeals to construe Judie's testimony in this fashion violates the principles enunciated by this court.

Chatz v. *Armour Plant Employees' Credit Union* (1946), 7 Cir., 154 Fed. (2d) 236, 240.
Maryland Casualty Company v. *Cushing* (1948), 7 Cir., 171 Fed. (2d) 257, 259.

The conclusion that statements may be interpreted either way is itself a clear call for the court to support that one adopted by the District Court.

It is actually the contention of petitioner that the statements can reasonably be interpreted only in the manner stated by the District Court. The total effect of Judie's admissions with respect to intention clinch the point. He could not have had those intentions and then written the lease as he did except by inadvertence, neglect or lack of knowledge. It is to be noted that in the examination of Judie there was no redirect examination after the cross-examination which brought out these statements with respect to intention, although the colloquy of counsel indicated that respondents' attorney was aware of the damaging nature of the answers, and was made aware of the right to obtain further explanation from his client with respect to them on redirect examination. It is, therefore, respectfully submitted that the Court of Appeals erred in rejecting the findings of fact, and erred in failing to give to Judie's testimony that construction which was most favorable to the support of the findings.

2. Controversy Over Meaning of Language Used in Negotiations Not Strong Indication That There Was No Meeting of the Minds.

We cite no cases with respect to the matter contained in this section of the argument. It relates to the unique assertion in the decision of the Court of Appeals (R. 237) to the effect that since there is a controversy as to what was intended by Judie in his offer as contained in the letter of May 13, 1946 (R. 17-19), that that in itself is a strong indication that there was no meeting of the minds, and, therefore, no mutual mistake.

This seems to be a wholly new approach to the problems involved in an action for reformation. It is clear from the totality of evidence that with respect to taxes both parties knew and understood what was meant by the credit for taxes, and that in that respect the letter fulfilled the expectations of both parties as created by the earlier negotiations. The meeting of the minds arrived at in the negotiations was not in itself a contract but an agreement between the parties as to what should be included in the contract.

Every case in which reformation is sought for mutual mistake involves a controversy. Most of the cases involve a controversy as to what was said or written, or both, prior to the preparation of the final instrument executed by the parties. If there were no controversy there would be no case, for the parties could, under those circumstances, be expected to reach an agreement and to solve the difficulty of correct expression by a mutual arrangement. In the event the parties cannot achieve this kind of a mutual arrangement, then a controversy, either as to what was said or written, or what was intended by what was said or written, must arise. Is this controversy to be given the status of "a strong indication that there was no meeting of the minds, and, therefore, no mutual mistake"?

As applied by the Court of Appeals in this case it would appear that the remedy of reformation is proscribed to anyone except a person dealing with another who confesses that there is an error in the instrument and that it should be corrected. This is not, it is submitted, the rule either in Indiana or in any jurisdiction which recognizes the equitable remedy of reformation. The remedy of reformation is capable of being applied regardless of the denials and the arguments and the controversies raised by a party resisting reformation, provided that adequate proof of the mutuality of the mistake is presented upon trial.

3. Negligence Does Not Preclude Reformation.

Reformation for mutual mistake is a remedy available to parties whose intentions have not been carried out in the final instrument when for some reason the expression of the intention is not wholly apt. One of the most complete and careful analyses of the exact position of the remedy in its relationship to various fact situations is to be found in *Jumper* v. *Queen Mab Lumber Co.*, 106 S. E. 473 (S. Ct. S. C. 1921). There are two quotations from this case, which, though somewhat lengthy, are of the utmost importance in the instant case. The court says at page 477:

> "We are of the opinion that much of the confusion incident to this question would be dissipated, if it should be recognized as a distinct branch of equity jurisprudence to reform a written contract where it unquestionably appears that, contrary to the intention of both parties, it does not express the prior oral agreement of the parties in a material particular, irrespective of the cause of such discord. Where this discord appears, someone has blundered; if the paper was prepared by an attorney or scrivenor, he has either not been sufficiently informed of the agreement of the parties by them, or has erroneously interpreted his information and directions; if not sufficiently informed, it was the fault of the parties; if when presented for

> their signatures they thought or assumed that no discord existed, their signing would be the result of their co-operative fault, if one of them discovered the discord and remained silent, it would be a fraud upon the other not to call attention to it. In any conceivable event, therefore, reformation would be decreed."

and the court continues on page 478:

> "We are thoroughly convinced that the written contract did not express the terms of the parol agreement between the parties; that the discord was due to the fault of both parties in not sufficiently informing the attorney as to the terms of the agreement between them, or of his failure to properly interpret that information, and to the failure of both parties not to carefully read the contract before signing and to detect the discord; that both parties honestly believed at the time of the execution of the contract, or confidingly assumed, that the written contract correctly stated the terms of that agreement."

The agreement of the parties is not agreement in the sense of a binding contract arrived at orally, but a mutual understanding with respect to certain terms of the contract which were intended to be included when the instrument was reduced to writing. In this respect the instant case demonstrates the wisdom of the rule. The negotiations had been with respect to the rent, the payment of taxes and insurance, and percentage rent. The final instrument covered many additional things. Petitioner assumed and believed that as to that which had been agreed the lease expressed the intention and caused the remainder of the lease to be carefully examined. Later it found that it was in error. This error in not catching the mistake, as to the point at which excess rentals would begin, was matched precisely by Judie's error in mistaking the point at which excess rental would begin. The mistake of each party was directed at that particular thing, and both parties erred with respect to it.

In a case in which the mistake is made by one party alone and there is no fraud involved, then the remedy of reformation is not applicable. The party must seek rescission. If the party seeking rescission has been negligent that remedy is withheld. In the application of the remedy for reformation, the mutuality of the mistake means that both parties have been negligent in expressing their intention. The word negligence is sometimes bypassed and glossed over by the use of other terms, as "inadvertence", but essentially reformation depends upon the existence of a mutual mistake (or upon some kind of fraud not here involved), and mutual mistake is itself a statement of the existence of mutual negligence.

The decisions of the Supreme Court of Indiana are not wholly clear on this subject, but it is not accurate to say that the law as determined in the State of Indiana follows the cases cited by the Circuit Court of Appeals. The first case cited on this point (R. 231-2) is *Toops* v. *Snyder, et al.*, 70 Ind. 554, 560, which involves not a mistake in expressing an intention, but a mistake in having an intention, the effects of which were not understood, a mistake of law and not of fact. The case of *Upton, Assignee* v. *Tribilcock*, 91 U. S. 45, 50 (R. 232-3), involves fraudulent representations, and in effect an effort to rescind the legal effects of the contract. Two cases also cited by the court: *Vargas* v. *Esquire, Inc.*, 166 F. 2d 651, 654, and *Lawrence* v. *Muter Co. et al.*, 171 F. 2d 380, 384 (R. 233), do not involve reformation on the ground of mutual mistake, but the first involves an action for the cancellation of a contract and the second, the effect of fraudulent representations and the failure to read an instrument. It is submitted that these cases among those relied upon do not effectively involve the point at issue in a case of reformation for mutual mistake.

The early Indiana cases are clearly in conflict, as may be seen by comparing the cases relied upon by the Court of Appeals, *Robinson et al.* v. *Glass*, 94 Ind. 211, 212, and *Habbe* v. *Viele*, 148 Ind. 116, 125 (R. 232), with the case of *Schwartz* v. *Keenor, infra.* The later Indiana cases as cited below clearly demonstrate the adoption of the view that negligence in failing to read an instrument does not defeat the right to relief by reformation.

However, the Indiana cases are not by any means clear on this point, and attention is called to the following:

The Board of Commissioners of Hamilton County v. *Owens* (1894), 138 Ind. 183, 187.

Schwartz v. *Keenor, et al.* (1882), 87 Ind. 258.

Hammond Hotel and Improvement Co. v. *Perrin* (1932), 96 Ind. App. 311, 318, 184 N. E. 946.

Renihan v. *Piowaty* (1932), 94 Ind. App. 523, 529, 179 N. E. 568.

McNair v. *Public Savings Insurance Company of North America, et al.* (1928), 88 Ind. App. 386, 397.

Sinclair v. *Pugh* (1902), 29 Ind. App. 614, 619.

Brier v. *Rosebrock* (1921), 76 Ind. App. 290, 295, 53 C. J. 975, Sec. 113.

Also compare:

Massachusetts Bonding & Investment Co. v. *Lundy* (1947), 8 Cir., 160 Fed. (2d) 680, 683.

Skelton v. *Federal Surety Company* (1926), 15 Fed. 2nd, 756, 799, 8 Cir.

Sanders v. *Monroe, Cir.* (1926), 10 Fed. 2nd, 997, 999.

It should be pointed out once again that the failure to read the lease is the failure to read that one section as to which both parties assumed there was no possible ground

for difference of opinion or view, because of a complete mutual understanding. The cases referred to within the State of Indiana grant reformation in instances in which there was a failure to read a contract, and the courts have said in Indiana that this will not defeat an action for reformation. Reference on this point is made to the following: Pomeroy Eq. Jur. (3rd Ed.) 856, and Restatement of the Law of Contracts, Secs. 504 and 508.

The net result of a study of the Indiana cases and of a study of the editorial matter contained in Pomeroy and the Restatement cited just above point clearly to the conclusion that negligence is not a bar to relief by way of reformation if there has been a mutual mistake.

It is respectfully submitted that the Court of Appeals erred in ruling that the petitioner could not obtain reformation because of its negligence and in holding that the District Court should dismiss petitioner's action for want of equity.

Respectfully submitted,

S. J. Crumpacker, Sr.,
Walter Feldesman,
George N. Beamer,
Nathan Levy,
Counsel for Petitioner.